Dalton Schools, Inc., d/b/a The Dalton School *and* David Brune. Case 02–CA–138611

June 1, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On June 1, 2015, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1] In addition, the General Counsel filed limited cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[3]

1. We agree with the judge that Charging Party David Brune engaged in protected concerted activity when he emailed his theater department colleagues on February 6, 2014. We further agree that the content of his email was not so opprobrious as to cause Brune to lose the protection of the Act. Because the Respondent's decision to rescind Brune's employment contract was based on that protected concerted activity, we adopt the judge's finding that the Respondent's action violated Section 8(a)(1) of the Act.[4]

The department chair had proposed sending a joint letter of protest to the administration and circulated a first draft; another colleague then proposed alternate language. Brune's subsequent contribution to the discussion was impassioned and, one might even say, theatrical. But it was well within the ambit of speech protected by the Act. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008).

The Respondent asserts that we are judging Brune's behavior under standards more appropriate to the factory floor, and that Brune's conduct lost the Act's protection because it failed to meet the standards of conduct of the "academic world." To the contrary, we acknowledge the importance of context. In fact, it strikes us that Brune's email was written in a tone entirely appropriate for the setting. It is hard to imagine Brune's speculation—that management's indifference to employee complaints would result in employees "merely spinning our wheels, . . . in the mud . . . alone and cold on this unbright cinder" (ellipses original)—in a setting other than an academic one. We reject the notion that professional colleagues, discussing collective action among themselves, can be disciplined or discharged merely for criticizing management in sharp and unequivocal terms. See id. at 204–205 (nurse did not lose the Act's protection by speaking critically with other nurses about newly implemented managerial policies and, in a statement overheard by a supervisor, telling a colleague that management had "not [been] truthful" with employees and that their new evaluation process "was just part of a management ploy").[5]

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[1] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We amend the remedy, Order and notice to conform to the violation found and to our recent decision in *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016). We have substituted a new notice to conform to the Order as modified.

In his cross-exceptions, the General Counsel requests that Brune be reimbursed for any out-of-pocket expenses incurred while searching for work as a result of the discrimination against him. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time.

Also, we correct a typographical error in the last paragraph of footnote 5 of the judge's decision. The judge inadvertently stated the pertinent date as "February 6, 2004" rather than "February 6, 2014."

[4] Member Miscimarra joins his colleagues in finding that Brune engaged in protected concerted activity and that Brune did not lose the protection of the Act. Although the judge stated that Department Chairman Robert Sloan's exercise of supervisory authority was "too isolated to qualify him as a Section 2(11) supervisor," Member Miscimarra would find that frequency of exercise of supervisory authority is not determinative of supervisory status because Section 2(11) requires only possession of authority to carry out a supervisory function, not its actual exercise. See, e.g., *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). Assuming that Sloan was a statutory supervisor, Member Miscimarra would find under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), that Brune's email, received by Sloan, did not forfeit the Act's protection. Alternatively, if Sloan is not a statutory supervisor, Member Miscimarra agrees with the judge that Brune retained the Act's protection under what the judge described as the "more amorphous totality of the circumstances test."

[5] We note that according to some witnesses' testimony about a meeting conducted by Respondent on March 11, 2014, Brune falsely denied having previously made negative statements about the admin-

The Respondent's heavy reliance on *Carleton College v. NLRB*, 230 F.3d 1075 (8th Cir. 2000), is misplaced. Although the Board assessed the facts of that case differently than did the court of appeals, the court's decision is also readily distinguishable. There, the court found a lack of protection for an adjunct faculty member who, in a private meeting with the dean of the college, used profanity, called his department a "laughingstock," and refused to commit to "act in a professional manner" or even to express loyalty to the college. See id. at 1080–1081. Here, Brune, who after all was not addressing the Respondent's administration in his emails, but rather his faculty colleagues,[6] in no way demonstrated the same lack of respect.

2. We find merit, however, in the Respondent's exception to the judge's finding that the Respondent unlawfully interrogated Brune on March 11, 2014.[7] This allegation, which was not contained in either the charge or the Complaint, was not fully litigated at the hearing, as required by *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The Respondent was not put on notice that the facts pertaining to the March 11 meeting would be used to prove a separate interrogation violation, and therefore the Respondent did not have the opportunity to mount a defense. Under these circumstances, we find that the interrogation allegation was not fully and fairly litigated. See *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 105 (2006).

istration. (In fact, Brune's protected February 6 email referred to the school's administrators as having "lied" and having not been "honest, forthright, upstanding, moral, considerate, [or] . . . intelligent or wise.") This testimony was contradicted by Brune (who testified he was not questioned along these lines at the March 11 meeting), and the judge found it unnecessary to resolve this contradiction. We agree with the judge's finding that, even if Brune falsely denied making such statements, the false denials would not affect the outcome of this case because the Respondent did not rely on them as a basis for withdrawing Brune's contract. Additionally, to the extent that Brune falsely denied having previously made such negative statements, such false denials did not forfeit Brune the Act's protection because, in the circumstances presented here, they would have reflected a "legitimate interest in shielding [his] Sec. 7 activity from employer inquiry," *Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, slip op. at 1 fn. 3 (2015), and the questions posed to Brune did not otherwise concern his job performance or relate to other legitimate business considerations, id., slip op. at 1–2.

[6] Indeed, the discovery that management had seen his comments doubtless "came as a complete, and unwelcome surprise" to Brune. *Triple Play Sports Bar & Grille,* 361 NLRB No. 31, slip op. at 4 fn. 16 (2014), enfd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015).

[7] Member Miscimarra also disavows the judge's unnecessary suggestion that Respondent's handbook violates the Act. The complaint does not allege that the handbook violates the Act.

ORDER

The Respondent, Dalton Schools, Inc., d/b/a The Dalton School, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully rescinding the employment contracts of or otherwise discriminating against employees because of their participation in protected, concerted activities under Section 7 of the Act; and

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee David Brune full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee David Brune whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

(c) Compensate employee David Brune for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful contract rescission, and within 3 days thereafter, notify employee Brune in writing that that has been done and that the contract rescission will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 17, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. June 1, 2016

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT rescind your employment contract because you engage in activities on behalf of, or in support of, your fellow employees regarding wages, hours, or other terms and condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above, which are guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer David Brune full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make David Brune whole for the wages and other benefits he lost as a result of our unlawful rescission of his employment contract, less any net interim earnings, plus interest.

WE WILL compensate David Brune for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the April 17, 2014 rescission of the employment contract of David Brune, and WE WILL, within 3 days thereafter, notify David Brune in writing that this has been done and that the contract rescission will not be used against him in any way.

DALTON SCHOOLS, INC., D/B/A THE DALTON SCHOOL

The Board's decision can be found at www.nlrb.gov/case/02-CA-136811 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Rebecca A. Leaf, Esq., for the General Counsel.
Michael J. Volpe and *Raquel O. Alvarenga, Esqs. (Venable, LLP),* of New York, New York, for the Respondent.
Margaret McIntyre, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in New York, New York on April 20–21, 2015. David Brune, an individual, filed the charge on October 10, 2014. The General Counsel issued the complaint on January 30, 2015.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by terminating the Charging Party, David Brune on April 17, 2014. On that date Respondent rescinded its offer of employment to Brune for the September 2014–August 2015 school year.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, the Dalton School, is an independent private school, grades Kindergarten through 12th grade, located in New York City. It annually derives more than $1 million in gross revenues. Respondent also purchases and receives goods and materials valued in excess of $5,000 at its New York location directly from places outside of New York State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent hired David Brune in September 2001. He worked in the school theater department as a teacher, technical director and production manager. In 2013–14, that department had at least four and maybe five employees, depending upon whether Department Chairman Robert Sloan is a statutory employee or a statutory supervisor. Beside Brune and Sloan the employees in the theater department were Allen Kennedy, Kevin Gallagher and Meg Zeder.

In about 2010, Sloan replaced Kennedy as department chairman. Around this time, there was sufficient dissension within the theater department that Respondent hired a consultant to help the members of the theater department communicate better with each other.

David Brune taught 3 middle school classes in theatrical production and 3 high school classes in stage craft and production. He was also a faculty advisor to student clubs and technical director of the school's theater.

Dalton School has a number of annual theater productions. There are high school productions and several middle school productions. Each year the middle school puts on a major musical in late January. Brune is in charge of the lighting, sound, and the building, painting and rigging of the scenery.

Thoroughly Modern Millie

Sometime in 2013, Kevin Gallagher recommended that the middle school play for January 2014 be *Thoroughly Modern Millie*.[1] Gallagher's recommendation was approved by the theater department and approved by the Middle School principal, Lorri Hamilton-Durbin.

Preparations for the production of *Thoroughly Modern Millie* began months prior to January 2014. Sometime in about early January 2014, after rehearsals began, some parents and possibly some faculty members complained about the ethnic stereotypes of certain Asian characters in the play.

On about January 10, 2014 production of the play, which was scheduled to open on about January 29, was halted. James Best, the associate head of the Dalton School, emailed Brune to tell him not to go to New Jersey to pick up the props for the play.

For a period of time, the school considered doing a musical revue, rather than a musical play. This was not an ideal solution in that it left all the students who did not have singing parts with less to do in the production. This apparently also affected the students on the stage crew. In the week before the scheduled opening, students rewrote parts of the play to excise the stereotypes which some found offensive.[2] Brune learned that a musical would be performed 3 days before the play was scheduled to open. A lot of work had to be done in a very short time in order for the musical play to be performed as scheduled. Nevertheless, the play was performed successfully.

Respondent renews David Brune's contract for the 2014–2015 school year

Dalton faculty members are employed on a year to year contractual basis. The school renewed David Brune's contract every year from 2001 to 2013. On February 3, 2014, Respondent offered to renew Brune's employment contract for another year, September 1, 2014 to August 31, 2015. He signed and accepted the offer almost immediately.

Dissention in the Theater Department concerning Thoroughly Modern Millie

Several theater department staff members were unhappy with how the changes in the play were handled. On February 6, 2014, Department Chairman Robert Sloan drafted a letter that he proposed to send to Dalton management; Ellen Stein, the head of the school, Jim Best, the associate head of the school

[1] I take judicial notice of the fact that *Thoroughly Modern Millie* was a major movie starring Julie Andrews and Mary Tyler Moore in the 1960s. Much later it was rewritten as a musical by Richard Scanlan. Scanlan's version was performed on Broadway sometime after 2000 and is currently performed by various school groups.

[2] All changes to the play had to be approved by the playwright.

and Lorri Hamilton-Durbin, the director of the middle school. Sloan's draft stated that "we" wanted to make management aware of the tremendous amount of extra time, energy and artistry involved in production the various "incarnations" of the play. The draft described as "excruciating" dealing with the changes in the production. The draft concluded:

> That said, we did feel somewhat taken for granted in that there seemed to be an expectation that whatever new shape the production took, the department would find a way to make it work. We did, but perhaps some recognition of that extra effort might be in order.

About an hour and a half later, Allen Kennedy responded to Sloan and other members of the theater department. Kennedy suggested some slightly stronger language:

> … By the resounding silence in reaction to MILLIE on this matter, we assume that the school's leaders must be unaware of the excruciating personal costs of this recent debacle on the theatre faculty and production team. Accordingly we're compelled to state clearly the human price paid for our recent adventure in hopes that some thanks and acknowledgement, and perhaps even an apology, be forthcoming for the totally unnecessary expenditure of time, resources, and psychic energy that resulted in what was finally an excellent outcome with the children.

The Charging Party, David Brune, sent 3 emails to other members of the theater department.[3] Since it is the second, sent on February 6, 2014 at 4:38 p.m. that led to his discharge, I will ignore the first. The second email, sent to other department members, reads as follows:[4]

> From **David Brune** February 6, 2014 4:38:18 PM
> Subject Re(2): first draft of letter
> To: Allen Kennedy Department
>
> People,
>
> I don't think we need grovel at the feet of the administration and beg for scraps, for thanks or appreciation. I don't think they need to recognize our work and the work of our students. They haven't in the past. They obviously have no idea of what we do and it's not our job to educate them. We are not petitioning for their sympathy or their understanding. We are seeking redress of grievances. We have been grievously wronged and we would like an apology, a direct sincere apology from all of them to all of us, and not a quick, "oh, Gosh, sorry about all that, in passing in the hall. An apology would indicate that they know what they did and are courageous enough to take responsibility for their actions. Ellen as much as said that they lied to us and lied to the students. OK. You lied. Apologize for lying. Apologize for not allowing us to answer directly, face to face, the questions a member of the community *had about* certain aspects of the script. Apologize for not being able to trust us to be adults, to be teachers and to be committed professionals. Apologize for issuing directives to middle school advisors on exactly what to say and what not to say to their students about the situation. Apologize for not being honest, forthright, upstanding, moral, considerate, much less intelligent or wise. Apologize for creating a situation and turning around and blaming us for being responsible for such a painful hubbub in the community. Apologize for demonizing us, for making us the bad guys, for forcing us to toe the line or else. Apologize for the threats to our job if we didn't straighten up and fly right. Be honest with us, for once. And then leave us alone to do our job, which we have been doing very well, thank you, for years without your intervention. And if anyone in the parent body has concerns about our work, have then come to us and address us directly. I think we can deal with that. I think it is the best thing to do. I think it is the only honest, adult thing to do.
>
> So, no, neither letter is any good. What we need is a strong letter from all of us demanding an apology.....period...forget how hard poor little we worked. Who cares? If they refuse to address our greviences and hunker in the bunker on the 8th floor, then there is nothing we can do. Nothing.. .They will make sure *that* everything vanishes down the Memory Hole and that will be that..... status quo—things will remain as they are .... hypocracy will have triumphed.., and we will be merely spinning our wheels,..in the mud .... alone and cold on this unbright cinder .... and it will just be too damn bad.
>
> I'm sure 1 have left some things out....
>
> David

Kevin Gallagher responded to Brune, with a copy to Allen Kennedy and others in the theater department on February 7. The essence of Gallagher's email was that any protest to the school management or soliciting praise for a job well done would fall on deaf ears. Gallagher advocating putting the *Thoroughly Modern Millie* issues behind them and concentrating on other issues.

David Brune sent department staff another email on February 9, suggesting an alternative to confronting the administration. This was essentially a plan to avoid a repeat of the *Thoroughly Modern Millie* controversy in the future.

Between February 6 and February 11, Robert Sloan told Ellen Stein about David Brune's email of February 6 suggesting that theater staff request an apology from Dalton management (G.C. 3 and 7). She requested that Sloan provide her with a copy of that email. He did so.

Meeting on March 11, 2014

On March 11, 2014, Ellen Stein summoned David Brune to a meeting with herself, James Best and Lorri Hamilton-Durbin. Possibly the only disputed facts in this case concern what was said in this meeting. All four agree that the meeting concerned

[3] Brune's emails were sent only to fellow members of theater department. They were not sent to, and was not accessible by, Dalton's administration (Ellen Stein, Jim Best and Lorri Hamilton-Durbin), parents, students or the general public.

[4] The third email, G.C. Exh. 9, which proposes a course of action in addition to requesting an apology. was sent to other members of the theater department on February 9. There is no evidence that Respondent's management was aware of this email (unless one deems Robert Sloan to be a statutory supervisor).

Thoroughly Modern Millie and that nobody mentioned Brune's February 6 email.

Brune's testimony about the meeting is as follows:

> The March 11 meeting was essentially a debriefing meeting about the situation. We discussed—I discussed the situation. I thought it was—they asked for my opinion. I told them it was unfortunate, handled in an unfortunate way that I believed that clear and honest and open discussion among all the participants in a creative situation like theater is the best policy and that we should have been allowed to talk to the concerned parents and address their concerns directly. I—the administration said that was privileged communication and so we—we're not allowed to address them directly. We discussed the amount of extra work that the situation with Thoroughly Modern Millie caused us in the department, a tremendous amount of extra work to deal with the various changes in production strategy. Tr. 68.

Ellen Stein testified that she asked Brune if he had said anything negative about the administration such as lying, being immoral, unintelligent et. cetera. She did not testify as to Brune's answer. However, James Best testified that he and Stein asked Brune, "whether he had communicated about the administration being dishonest and immoral," Tr. 151. Best testified that Brune answered that he had said nothing of the sort.

Middle School Director Lorri Hamilton-Durbin testified that on March 11, Stein asked Brune if he had said or done anything that was expressing his discontent with the administration. She testified that Brune answered, No. Tr. 167–68. She said that Best asked Brune if he had labeled the administration dishonest or immoral and that he denied this. Hamilton-Durbin testified that at the end of the meeting, Stein asked, "if David had said things about her or called us dishonest, and he said no."

There are no contemporaneous notes of what transpired at the March 11 meeting. On May 27, 2014, Stein wrote a memo, on advice of counsel, in which she recalled asking Brune twice if he had said anything negative about the administration – that the administration had lied, that it was immoral, etc., and that Brune denied doing so. She also wrote that Best asked the same question and received the same denial.

The April 17, 2014 meeting

On April 17, 2014, Stein and Best called David Brune to another meeting. Stein handed Brune a copy of his February 6 email (the email beginning "people") and asked him if he wrote it. Brune admitted that he did so. Stein and Best gave Brune a choice of continuing to teach through the end of the school year or leaving immediately. The next week Brune told Stein and Best that he would like to stay at Dalton until the end of the term.

There is absolutely no evidence in this record that Stein and/or Best told Brune on April 17, that his contract was being rescinded in part because he lied to them on March 11. I credit Brune's testimony that first time he was told this was on May 9, Tr. 118. I also rely in part of the fact that Brune sent an email to Stein, Best, Durbin on May 22, 2014 stating that Stein first told him he lied on May 9, R. Exh- 5. I therefore conclude that Respondent rescinded his contract solely for the contents of the February 6 email and that its reliance on his alleged lying on March 11 is a post-hoc rationalization.[5]

Analysis

Respondent violated Section 8(a)(1) in rescinding David Brune's employment contract

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging, or as in this case, allegedly rescinding an employee's contract because they engaged activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* ... (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

The discussion amongst employees in the theater department as to how to address their concerns regarding the manner in which *Thoroughly Modern Millie* was handled was clearly protected concerted activity. Moreover, contrary to Respond-

[5] I find the testimony of Brune, Stein, Best and Hamilton-Durbin equally credible about what was said on March 11. However, I find that what was said does not matter to the outcome of this case, because Respondent did not rely on Brune's alleged lying in rescinding his contract.

I would reach no different result in this case even if I were to credit Respondent's witnesses and discredit Brune as to what was said on March 11, and find that his "lie" was one of the reasons his contract was rescinded on April 17.

Brune's discharge would not be rendered lawful even if he lied to Respondent on March 11 and if Respondent discharged him in part for this lie. The "lie" was elicited by Respondent during an investigation that was motivated by Respondent's animus towards Brune's protected email. Thus, reliance on such a "lie" is not a legitimate defense to his discharge, *Kiddie, Inc.,* 294 NLRB 840 n. 3 (1989) and cases cited therein. Moreover, Respondent's interrogation of Brune regarding his protected activity on March 11, although not alleged in the complaint, violated the Act. Given that the interrogation was unlawful, Brune was under no obligation to respond truthfully. His "dishonesty" does not constitute a lawful reason for his discharge, *United Services Automobile Assn.,* 340 NLRB 784, 785–86 (2003) enfd. 387 F. 3d 908 (D.C. Cir. 2004).

I totally discredit any testimony from Respondent's witnesses suggesting that any conduct by Brune prior to February 6, 2004 had anything to do with the rescission of his employment contract. Respondent renewed Brune's contract despite any issues it had with him prior to February 6. Moreover, Stein did not mention pre-2014 conduct to Brune on April 17, when she informed him that his contract was being rescinded, Tr. 152–53.

ent's brief at page 14, Brune's email was clearly intended to induce group action. He stated, "What we need is a strong letter from all of us demanding an apology." The fact that no group address was ever made to management does not lead to any different result.[6]

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity. When Ellen Stein saw that David Brune's emails were sent to the theater department and from the context of his email she knew that he was responding to communications from other employees regarding how to address the issues surrounding the production of *Thoroughly Modern Millie.*[7]

Respondent's contention in its brief that Ms. Stein did not know of the concerted nature of the Brune's February 6 email has absolutely no support in this record. At Tr. 24–25, Stein testified in response to the General Counsel as follows:

> Q. And you knew that David had sent this email to members of the theater department; isn't that right?
> A. Correct.
> Q. And the theater department includes Mr. Brune's colleagues, correct?
> A. And supervisor, Correct?
> Q. Okay, So that is Bob Sloan, Kevin Gallagher, Meg Zeder and Allen Kennedy; is that right?
> A. Correct.
> Q. Those are the members of the theater department. You said his supervisor; who do you mean?
> A. Bob Sloan.
> Q. And these people who I just listed, those are the only individuals on the theater department email list serve; is that right?
> A. I believe so.

This exchange establishes that Stein knew that Brune had sent the email to other employees. At no point during the hearing did she contend that she thought the email had been sent only to Sloan.[8]

Moreover, when meeting with Stein and Best on March 11, Brune made it clear that he was speaking for other employees in the theater department as well as himself regarding the extra work caused by the last minute changes to the production of *Thoroughly Modern Millie.*

The only issue in this case is whether the statements made in this email are of such a nature that they forfeit the protection of the Act. The criteria for evaluating whether an employee's conduct while engaging in protected activity forfeits the protection of the Act depends in part on when and where the allegedly protected conduct occurred. In the case of direct communications between an employee and manager or supervisor the criteria is set forth in *Atlantic Steel Co.,* 245 NLRB 814 (1979). In making this determination the Board balances four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.,* 343 NLRB 1431, 1437 (2004) .

Different criteria are used in cases addressing off-duty, off-site communications with other employees or third parties using social media, *Triple Play Sports Bar & Grille,* 361 NLRB No. 31 (2014); *Pier Sixty, LLC,* 362 NLRB No. 59 (March 31, 2015).

Consideration of factors 1 and 2 in the *Atlantic Steel* test favor a finding that Brune did not lose the protection of the Act. His protected activity was not a face-to-face outburst to management.[9] Moreover, his email was accessible only to fellow employees, not students, parents or the general public. In fact, the email was not intended to be seen by management and was not directly accessible to management. There is no evidence that Brune's email adversely affected the ability of theater department employees to do their jobs [apart from whatever bad feeling lingered as a result of the *Thoroughly Modern Millie* experience generally]. As a result, I find that the *Atlantic Steel* test not to be strictly applicable to this case. Rather the test I apply is the more amorphous totality of the circumstances test, as was applied in *Triple Play Sports Bar* and *Pier Sixty.*[10],[11] In

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[6] Similarly, there is no merit to Respondent's contention at page 14 of its brief that Brune's email did not relate to terms and conditions of employment. Sloan's draft stating that "we" want to make management aware of the extra time, energy and artistry involved in producing *Thoroughly Modern Millie* under the conditions prevailing in January 2014 and the responses from Kennedy and Brune, clearly demonstrate that several theater employees were concerned about a term and condition of employment.

[7] The beginning of the second paragraph of Brune's email, "So, no, neither letter is any good," makes it clear that Brune was responding to communications from others in the department.

[8] Thus, I need not decide whether Respondent has established that Sloan was a statutory supervisor rather than an employee. However, there is no evidence as to how frequently Sloan effectively recommended employees for hire, or the last time that he did so. Pursuant to the Board decision in *Greenspan, D.D.S., P.C.,* 318 NLRB 70 (1995) enfd. mem.101 F. 2d. 107 (2d Cir. 1996) and *Shaw, Inc.,* 350 NLRB 354, 357 and n. 21 (2007), I conclude that Sloan's exercise of authority is too isolated to qualify him as a section 2(11) supervisor. On the other hand, if Sloan was a supervisor, his knowledge of the concerted nature of Brune's email is imputed to Respondent.

Lorri Hamilton-Durbin, who attended the March 11 meeting with Stein, Best and Brune, was aware from a January 29, 2014 meeting, that a number of faculty members had complaints about the way management had handled the controversy surrounding *Thoroughly Modern Millie.* She had also seen Brune's February 6 email. Thus, Hamilton-Durbin knew that the contents of that email amounted to more than an individual complaint from David Brune.

[9] In *Groves Truck & Trailer,* 281 NLRB 1194, 1195 (1986), the Board in finding the employer violated Section 8(a)(1), considered the fact that the employee's statement that the CEO was " a cheap s.o.b." was addressed to other employees; not to its target.

[10] If I were to apply *Atlantic Steel,* factor 3 tends to support finding that Brune's email was protected. The subject matter of Brune's email was a concern of several employees in the theater department. Factor 4 is irrelevant. Respondent did commit any unfair labor practices related to the subject of the email.

[11] I note, however, that in *Battle's Transportation, Inc.,* 362 NLRB No. 17 (February 24, 2015), n. 4, the Board considered a provocation that was not an unfair labor practice. The Board considered the fact

any event, I would reach the same result applying either test.[12]

A case directly on point is *Union Carbide Corp.,* 331 NLRB 356, 359–60 (2000) in which the Board held that an employee engaged in protected activity did not lose the protection of the Act by calling his supervisor a "f-g liar." Another similar case in *Ben Pekin Corp.,* 181 NLRB 1025 (1970) in which the Board held that an employee engaged in protected activity did not lose statutory protection by accusing the employer's president of bribing a union agent to accept a lower wage increase.[13]

On the other hand, in the *Atlantic Steel* case itself, the Board deferred to an arbitrator's ruling sustaining the discharge of an employee who called his supervisor a "lying s.o.b." The *Atlantic Steel* decision is at odds with later Board decisions in which similar conduct has been deemed insufficient to forfeit the protections of the Act. In *St. Margaret Mercy Health Care Centers,* 350 NLRB 203, 204–05 (2007), the Board citing *Dreis & Krump Mfg. v. NLRB,* 544 F. 2d 320 (7th Cir. 1976) stated the test as follows:

> Otherwise protected activity remain[s] protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.

In *St. Margaret Mercy,* the Board found that an employee did not forfeit the protection of the Act by telling other employees that management was not being truthful with regard to an employee evaluation process.

With regard to otherwise protected statements made to third parties, the Board has found that an employee forfeits the protection of the Act only if the statements are made with knowledge of their falsity or with reckless disregard for their truth or falsity, *Jimmy Johns,* 361 NLRB No. 27 (2014); *MasTec Advanced Technologies,* 357 NLRB No. 17 (2011). If one were to apply this test, Brune clearly did not forfeit the protection of the Act. Moreover, an employee should not be held to stricter scrutiny when communicating with co-workers, as opposed to potential customers of their employer.

In sum, I find that the totality of Board precedent leads me to conclude that Brune did not forfeit the protection of the Act. He did not make any malicious and/or untrue statements of fact. Brune did not use any obscenities. He did not threaten Respondent's management; he merely demanded an apology. Brune's email in questioning the honesty, integrity and intelligence of Respondent's management did not forfeit the protection of the Act. Respondent, therefore, violated Section 8(a)(1) in rescinding his employment contract.

To the extent that Respondent relies on its employee handbook, the handbook itself violates the Act in interfering with protected conduct. The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). If Respondent contends that Brune's email violated the conditions set forth in its employee handbook, the relevant portions of the handbook violate Section 8(a)(1).

Respondent violated Section 8(a)(1) in interrogating David Brune about his protected concerted activity on March 11, 2014.

Respondent's interrogation of Brune regarding his protected activity on March 11, although not alleged in the complaint, violated the Act, *United Services Automobile Assn.,* 340 NLRB 784, 785–86 (2003) enfd. 387 F. 3d 908 (D.C. Cir. 2004). When Respondent called Brune into the meeting, management had seen the February 6 email and was aware of its concerted nature. Indeed, the meeting was a trap. Respondent asked Brune about the email without letting on that it was aware of it. Thus, it would have expected Brune to answer its questions in the manner that he did, regardless of whether he answered as he testified or as management testified.

The Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and the violation has been fully litigated, *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F. 2d 130 (2d Cir. 1990). Here a close connection exists between the complaint allegation regarding the discharge and Respondent's interrogation regarding the protected concerted activity for which Brune was discharged. Moreover, Respondent herein relies on the March 11 interrogation as a defense for Brune's termination. I thus find that the legality of the March 11 interrogation was fairly and fully litigated and that this interrogation violated Section 8(a)(1).

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act in rescinding David Brune's employment contract for 2014–1015 on April 17, 2014.

Respondent violated Section 8(a)(1) in interrogating David

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that the employer told union steward Kearney to "shut up" during a grievance meeting a factor in determining that he did not forfeit the protection of the Act. In response to this remark, Kearney told the employer's chief operating officer to shut up, slammed his fist on the table and called her a liar and stupid in a raised voice. Also see *Felix Industries,* 331 NLRB 144, 145 (2000). In the instant case, Brune's email was clearly a response to Respondent's handling of the *Thoroughly Modern Millie* controversy and Robert Sloan's email. If Sloan is a supervisor, one could argue that his email was the provocation that should be taken into account in the *Atlantic Steel* analysis. The record is silent as to merits of employee dissatisfaction with Respondent's handling of *Thoroughly Modern Millie*.

[12] There is no reason or Board precedent on which to conclude that the section 7 rights of teachers, who are protected by the Act, is any less than those of other employees. As the General Counsel points out a similar argument can be made with respect to other categories of employees, such as those working in the health care industry. Where Congress has sought to curtain the section 7 rights of a class of employees, it has done so explicitly as in section 8(g) [10 days notice required before a labor organization may strike or picket at a health care institution].

[13] Other similar cases are *Harris, Inc.,* 269 NLRB 733, 738 (1984); *United States Postal Service,* 241 NLRB 389 (1979).

Brune about his protected concerted activity on March 11, 2014.

REMEDY

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth C*o., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010).

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on his Social Security earnings record.[14]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

Respondent, The Dalton School, New York, New York officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their protected concerted activities.

(b) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including but not limited to writing to management complaining about their treatment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer David Brune full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Brune whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate David Brune for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge/rescission and within 3 days thereafter notify David Brune in writing that this has been done and that the discharge/rescission will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional

Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix".[16] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 17, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 1, 2015.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[14] The General Counsel also seeks reimbursement for all Brune's expenses while seeking interim employment. At present, there is no Board precedent for such a remedy. It is up to the Board, not this judge to decide whether to change existing Board law.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your protected concerted activities, including your efforts to induce protests to management or to seek apologies from management.

WE WILL NOT discharge, rescind your employment contract or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including protesting or complaining about your wages, hours and/or other terms and conditions of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer David Brune full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Brune whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate David Brune for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge/contract rescission of David Brune, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge/contract rescission will not be used against him in any way.

DALTON SCHOOL, INC. D/B/A DALTON SCHOOL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-138611 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.